NO. 89-247

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

THE STATE OF COLORADO,

Petitioner,

v.

JOHN WESLEY LACY, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

BRIEF AMICI CURIAE OF THE STATES OF SOUTH DAKOTA, OKLAHOMA, ET AL.*

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
Counsel of Record

Craig M. Eichstadt
Assistant Attorney General

David D. Wiest
Assistant Attorney General
State Capitol
Pierre, S.D. 57501-5090
Telephone: (605) 773-3215

and

ROBERT H. HENRY
ATTORNEY GENERAL
State of Oklahoma

Elizabeth J. Bradford
Assistant Attorney General
112 State Capitol
Oklahoma City, Oklahoma 73105
Telephone: (405) 521-3921

Counsel for Amici Curiae*

*Additional Counsel and States represented are listed in the Appendix

QUESTION PRESENTED

WHETHER THE "REAL NOTICE OF THE TRUE NATURE OF THE CHARGE" TEST TO DETERMINE IF A GUILTY PLEA IS VOLUNTARY UNDER THE UNITED STATES CONSTITUTION WAS IMPERMISSIBLY EXPANDED TO REQUIRE AN ON-THE-RECORD EXPLANATION OF THE OFFENSE'S ELEMENTS?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	-i-
TABLE OF AUTHORITIES	-iii-
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENTS	3
ARGUMENTS	
I. A COLLATERAL ATTACK ON AN APPARENTLY VALID PLEA OF GUILTY IS NOT PERMISSIBLE UNDER THIS COURT'S PRECEDENTS, UNLESS THE DEFENDANT WAS NOT INFORMED OF THE TRUE NATURE OF THE CHARGE AGAINST HIM.	6
II. INCONSISTENCY OF INTERPRETATION REQUIRES THIS COURT TO ESTABLISH A UNIFORM, EASILY APPLIED RULE.	13
III. FULL FAITH AND CREDIT SHOULD BE REQUIRED FOR CRIMINAL CONVICTIONS OF SISTER STATES WHEN THE FORUM STATE'S LEGISLATURE HAS ACKNOWLEDGED SUCH CRIMINAL CONVICTIONS FOR SENTENCE ENHANCEMENT.	15
CONCLUSION	22
APPENDIX	

TABLE OF AUTHORITIES

	PAGE
Ames v. New York State Div. of Parole, 772 F.2d 13 (2d Cir. 1985)	14
Berry v. Mintzes, 726 F.2d 1142 (6th Cir. 1984)	14
Carlesi v. New York, 233 U.S. 51 (1914)	17
Fauntleroy v. Lum, 210 U.S. 230 (1908)	21
Gillard v. Scroggy, 847 F.2d 1141 (5th Cir. 1988)	13
Groseclose v. Plummer, 106 F.2d 311 (9th Cir. 1939)	19
Henderson v. Morgan, 426 U.S. 637 (1976)	PASSIM
Lacy v. Colorado, 775 P.2d 1 (Colo. 1989)	PASSIM
LoConte v. Dugger, 847 F.2d 745 (11th Cir. 1988)	13
Marin v. Augedahl, 247 U.S. 142 (1918)	20
Marshall v. Lonberger, 459 U.S. 422 (1983)	7, 10
Matusiak v. Kelly, 786 F.2d 536 (2d Cir. 1986)	14
Michigan v. Doran, 439 U.S. 282 (1978)	21, 22

Murray v. Louisiana, 347 F.2d 825 (5th Cir. 1965) 19

Nelson v. Callahan, 721 F.2d 397 (1st Cir. 1983) 13

Old Wayne Mutual Life Ass'n. v. McDonough, 204 U.S. 8 (1907) 18

Paulson v. Black, 728 F.2d 1164 (8th Cir. 1984) 13

Sober v. Crist, 644 F.2d 807 (9th Cir. 1981) 13

Teague v. Lane, 109 S.Ct. 1060 (1989) 12

United States v. Frye, 738 F.2d 196 (7th Cir. 1984) 14

Williams v. Florida, 399 U.S. 78 (1970) 12

Worthen v. Meachum, 842 F.2d 1179 (10th Cir. 1988) 13

OTHER REFERENCES:

U.S. Const., art. IV, § 1 15

R.E. Cushman and R.F. Cushman, Cases in Constitutional Law, (3d ed. 1968) 16

NO. 89-247

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

THE STATE OF COLORADO,

Petitioner,

v.

JOHN WESLEY LACY, JR.,

Respondent.

INTEREST OF AMICI CURIAE

The states of South Dakota, Oklahoma, et al. submit this brief as Amici Curiae in support of the Petition for Writ of Certiorari filed by the State of Colorado. Colorado seeks review of the decision of the Colorado Supreme Court in Lacy v. Colorado, 775 P.2d 1 (Colo. 1989). In urging the Court to grant certiorari, the State of South Dakota is joined by additional

states.[1] The Amici States, individually and collectively, have a strong interest in the issues presented by the State of Colorado in its petition. In particular, they have an overriding interest in the proper test to determine if a plea of guilty is voluntary.

Guilty pleas are a prevalent part of the criminal process. A guilty plea can be challenged to determine whether the plea was voluntary. The voluntariness of guilty pleas can be challenged on direct appeal from the guilty plea, during a sentence enhancement proceeding, on a state post-conviction habeas petition, on a federal habeas petition, and perhaps in other proceedings.

---

[1]This Brief of Amici Curiae is filed pursuant to Rule 36.4 of the rules of the Supreme Court. The additional Amici States are listed in the Appendix to this brief.

If the validity of a guilty plea must be relitigated, guidance is needed to determine the correct standard. All states in this Nation direct a tremendous amount of resources to defend challenges against the voluntariness of guilty pleas.

The states need some degree of finality to such determinations. Witnesses to crimes die. Defense attorneys, judges, court reporters, and other court personnel die or forget. Finality reinforces the integrity of the system. The Amici States therefore urge the Court to grant the State of Colorado's Petition for Writ of Certiorari, and reverse the judgment of the Colorado Supreme Court.

SUMMARY OF ARGUMENTS

The test to determine whether a plea of guilty is voluntary under the United States Constitution is whether the defendant had "real notice of the true nature of the charge against him." In this case, the Colorado

Supreme Court held that the defendant must have an "understanding of the critical elements of the crime" for a plea of guilty to be voluntary. Thus, the Colorado Supreme Court has expanded the test under the United States Constitution to determine whether a plea of guilty is voluntary. Such expansion conflicts with applicable decisions of this Court.

The "real notice of the true nature of the charge" test varies in interpretation among the circuit courts of appeal. Some courts have adhered closely to the traditional "real notice of the true nature of the charge" test. Other courts have expanded this test to include an explanation of the critical elements of the crime. One court requires explanation of <u>all</u> elements. Still another court requires the traditional rule plus a finding that the defendant knows his or her conduct actually falls within the

charge. Still other courts have applied different tests at different times. Therefore, this Court should address this issue to clear up the confusion among the various courts.

The courts in each of the states should give full faith and credit to the criminal convictions entered in a sister state. To preserve harmony among the states, and to carry out the full faith and credit clause, the states should accept a judgment of conviction in another state without conducting a full evidentiary hearing concerning validity of the judgment. Further, individual states should not be permitted to impose their views on federal constitutional law upon sister states, who stand as equals. Some degree of finality of criminal judgments is needed. Requiring states to accept such judgments when called for by their legislatures, under the doctrine

of full faith and credit, would promote finality.

ARGUMENTS

I

A COLLATERAL ATTACK ON AN APPARENTLY VALID PLEA OF GUILTY IS NOT PERMISSIBLE UNDER THIS COURT'S PRECEDENTS, UNLESS THE DEFENDANT WAS NOT INFORMED OF THE TRUE NATURE OF THE CHARGE AGAINST HIM.

This Court in Henderson v. Morgan, 426 U.S. 637 (1976) enunciated the test to determine whether a plea of guilty is voluntary. Specifically, the Henderson case stated that:

> the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." Smith v. O'Grady, 312 U.S. 329, 334 [1941].

Henderson, 426 U.S. at 645.

The test enunciated in Henderson is, simply enough, "real notice of the true

nature of the charge." Normally, the "real notice of the true nature of the charge" is satisfied by the colloquy between the trial court and the defendant during the process of taking the plea. Other methods are also available to show that the defendant understood the "real notice of the true nature of the charge":

> Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.

Henderson, 426 U.S. at 467. See also Marshall v. Lonberger, 459 U.S. 422 (1983).

The Supreme Court of Colorado in Lacy v. Colorado, 775 P.2d 1 (Colo. 1989) misapplied the voluntariness of guilty plea test as set

forth by this Court in the Henderson case, and thus brought itself into direct conflict with this Court on a question of federal constitutional law. After the opening recitation of the facts, the Colorado Supreme Court set forth its views on guilty plea voluntariness. This recitation included the Henderson rule. Lacy, 775 P.2d at 4 [Appendix to Petition for Certiorari at 30 (hereinafter Pet.App.)]. The Colorado Supreme Court then took an extra step, not required by this Court nor by several other courts,[2] and stated the defendant must have an "understanding of the critical elements of the crime to which the plea is tendered." Lacy, 775 P.2d at 5 [Pet.App. at 32]

---

[2] See Nelson v. Callahan, 721 F.2d 397 (1st Cir. 1983); Sober v. Crist, 644 F.2d 807 (9th Cir. 1981); Worthen v. Meachum, 842 F.2d 1179 (10th Cir. 1988).

(emphasis added). Based on this additional "elements" prong to the voluntariness of guilty plea test, the Colorado Supreme Court held that Lacy's prior criminal guilty pleas were involuntary. Lacy, 775 P.2d at 8-9 [Pet.App. at 38-42].

This Court's rule as set forth in the Henderson case requires no explanation of the elements to a defendant. The Henderson test requires that the trial court instruct defendant as to the "true nature of the charge against him." Henderson, 426 U.S. at 645. No mention is made of the elements of the crime. In fact, the Henderson Court assumed that "a description of every element of the offense" is not required. Henderson, 426 U.S. at 647 n. 18 (emphasis added).

The Colorado Court, on its own, has promulgated its own rule in conflict with the Henderson rule. Henderson states that "real notice of the true nature of the charge" can

be given in a number of ways. It can be delivered by defense counsel, by a reading of the indictment or information, by recitation of the factual basis of the crime, or by general discussion of the plea with the trial court. A separate listing of each and every element of the crime is not required by Henderson, 426 U.S. at 647, and, in fact, the other methods have been held sufficient. Marshall v. Lonberger, 459 U.S. at 436-37. No rote incantation is required, as Lacy seems to hold. Trial judges are not robots required to spew forth the elements of the crime to which a plea is entered. Through their conversations with defendants, courts will only accept the defendant's plea if voluntary. They are in the best position to determine whether the defendant is aware of what he is doing. The record need not contain magic words. Voluntariness can be determined in a number of ways.

This case is of considerable importance to the amici states because all of them are faced with application of habitual offender statutes years after prior convictions based upon pleas of guilty. If the Colorado Supreme Court's standards are adopted, it is likely that many guilty pleas will be invalidated and the states will be unable to apply their legitimate habitual offender statutes as intended. Those to whom habitual offender statutes are to be applied are those members of society most in need of punishment and most deserving of it. There are also significant public safety concerns in removing repeat offenders from society. The states do not seek to deprive those who have not understood their pleas of their rights. In this case, however, it is apparent that the question of what the defendant knew and when he knew it has taken a back seat to the requirement that there be a rote incantation

of magic words. Such a rule impedes the search for truth in the criminal justice system. See Williams v. Florida, 399 U.S. 78, 82 (1970).

The states also have a significant interest in the integrity of their criminal judgments. See Argument III.

The rule applied by the Colorado Court in this case is a significant break with prior precedent of this Court. If it were to be applied in other states, it would cause the retroactive invalidation of many guilty pleas by collateral attack long after they were finalized by expiration of time for appeal. Teague v. Lane, 109 S.Ct. 1060, 1072-73 (1989). This Court, even if inclined to apply the test set forth in Lacy (which these states vigorously oppose) should grant certiorari to clarify that guilty pleas will not be invalidated by this new rule until after the rule is announced.

II

INCONSISTENCY OF INTERPRETATION REQUIRES THIS COURT TO ESTABLISH A UNIFORM, EASILY APPLIED RULE.

The test for guilty plea voluntariness has been interpreted by many courts. Some courts seem to adhere closely to the "real notice of the true nature of the charge" test enunciated in Henderson. See Nelson v. Callahan, 721 F.2d 397, 400 (1st Cir. 1983); Sober v. Crist, 644 F.2d 807, 809 (9th Cir. 1981); Worthen v. Meachum, 842 F.2d 1179, 1183 (10th Cir. 1988). Some courts require both the Henderson "true nature of the charge" test and an explanation of the critical elements as well. See Gillard v. Scroggy, 847 F.2d 1141, 1143 (5th Cir. 1988); Paulson v. Black, 728 F.2d 1164, 1167 (8th Cir. 1984). At least one court requires the Henderson rule and all elements. See LoConte v. Dugger, 847 F.2d 745, 751 (11th Cir. 1988). At least one court uses the Henderson

"nature of the charge" test and may or may not use the elements test as well. See Berry v. Mintzes, 726 F.2d 1142, 1147 (6th Cir. 1984). Another court uses the rule that the "defendant must understand not only the nature of the charge against him or her, but also that his or her conduct actually falls within the charge." United States v. Frye, 738 F.2d 196, 199 (7th Cir. 1984). One court has apparently adopted two rules, one being the Henderson "true nature of the charge" rule, Matusiak v. Kelly, 786 F.2d 536, 543 (2d Cir. 1986), and has also used the Henderson rule and has required a description of the critical elements of the offense, Ames v. New York State Div. of Parole, 772 F.2d 13, 15 (2d Cir. 1985).

The above cases illustrate that there is division as to the proper test to determine if a guilty plea is voluntary. Guidance is needed in this ever expanding and important

area of criminal law. Judges, prosecutors, and defense attorneys need to be certain as to the proper requirements of a valid guilty plea.

III

FULL FAITH AND CREDIT SHOULD BE REQUIRED FOR CRIMINAL CONVICTIONS OF SISTER STATES WHEN THE FORUM STATE'S LEGISLATURE HAS ACKNOWLEDGED SUCH CRIMINAL CONVICTIONS FOR SENTENCE ENHANCEMENT.

Article IV, Section 1 of the United States Constitution directs that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The Colorado Supreme Court violated this provision when it refused to give full faith and credit to the guilty pleas of the sister states of Ohio and Washington. This type of violation will undermine the effectiveness and credibility of the judgments of sister states and will have a serious, negative

impact on habitual offender sentencing proceedings. The purpose of such statutes is to punish more severely offenders who continue to ignore the laws of the individual states. Therefore, this Court should reverse the decision because the action of the Colorado Supreme Court violated the full faith and credit clause of the Constitution.

The full faith and credit clause has consistently been applied in civil matters. Its application to matters of criminal law is less obvious because, in general, it is recognized that the criminal laws of a state, unlike the civil laws, have no extraterritorial effect--a state court will not enforce the criminal laws of its sister state. R.E. Cushman and R.F. Cushman, Cases in Constitutional Law, at 270 (3d ed. 1968). Where, however, a state recognizes criminal convictions of another state for purposes of enhancing the sentence of habitual criminals,

then the full faith and credit clause should be applied. This Court has recognized the discretionary authority of state legislatures to treat former imprisonment in another state as having the like effect as imprisonment in the state for purposes of showing that the offender is an habitual criminal. Carlesi v. New York, 233 U.S. 51, 58 (1914). Thus, the conviction, already obtained in the appropriate jurisdiction and recognized by the state legislature, should be given the proper respect by the sister state. If enforcement of a sister state's criminal laws is prohibited, collateral attack on a sister state's convictions should also be prohibited. The appropriate place to have attacked the convictions is in the forum state. Absent such a proceeding, the validity of the guilty pleas should not have been ruled upon by the Colorado Supreme Court.

It also recognized that full faith and credit for a state's judicial proceedings cannot be obtained in the court of other jurisdictions if those proceedings are wanting in due process. Old Wayne Mutual Life Ass'n. v. McDonough, 204 U.S. 8 (1907). In the present case, the basis of the Colorado Supreme Court's decision was its interpretation of the due process clause of the federal constitution. The Colorado Supreme Court extended Henderson beyond the parameters enunciated by this Court and applied its interpretation to the convictions of another state. Had the Colorado Supreme Court relied upon judicial interpretations of Henderson in the states from which the convictions arose, its reasoning would, perhaps, be justified. However, the Colorado Supreme Court has said it will accept criminal convictions of other states for purposes of enhancing criminal convictions in

accordance with its state law but that such convictions will be subjected to Colorado's interpretations and applications of federal constitutional law. Lacy, 775 P.2d at 3-7 [Pet.App. at 28-35]. If the Colorado Legislature accepts the judgments of sister states, then its courts should give those judgments full faith and credit.

As previously noted, the full faith and credit clause has generally been applied to matters of a civil nature. However, the application of the clause has previously been made to matters of criminal law. See Murray v. Louisiana, 347 F.2d 825 (5th Cir. 1965) (no violation of full faith and credit clause where Louisiana gave same effect to a Missouri pardon that a Missouri court would give); Groseclose v. Plummer, 106 F.2d 311 (9th Cir. 1939) (where Texas law not explicit on effect of pardon, no violation of full faith and credit where California included

pardoned offense in habitual criminal sentence since this procedure was allowed under California law). This Court is urged to explicitly extend the application of the full faith and credit clause to the situation now before it. The general justifications for the application of the clause have previously been stated by this Court.

In Marin v. Augedahl, 247 U.S. 142, 149 (1918), the Court stated:

> Whether the decision was right or wrong is not open to discussion here. If wrong it was subject to correction on proper application to the court which made it, or on appeal, but it was not void or open to collateral attack.

Further, this Court has said that courts of one state are not justified in denying full faith and credit to a judgment from a court of a sister state because the original court made a mistake of law, even in the law of the

second state. Fauntleroy v. Lum, 210 U.S. 230 (1908). The reasoning behind these decisions is sound and should be extended to apply to this case. The appropriate place to attack convictions from Ohio and Washington is in the courts of the States of Ohio and Washington, not in Colorado. See Michigan v. Doran, 439 U.S. 282, 290 (1978)(extradition warrant may not be challenged in courts of state holding fugitive, but may only be challenged in demanding state). The State of Colorado, having legislatively recognized the admissibility of criminal convictions from other states for purposes of enhancing the sentences of habitual criminal offenders, must presume validity of those convictions and grant them full faith and credit in their courts.

There is a necessity to preserve harmony between the states as well as order and law within the borders of those states. See

Doran, 439 U.S. at 290 (where judicial officer of demanding state has determined probable cause, courts of asylum state are without power to review determination). Extension of the Colorado Supreme Court's decision in Lacy would destroy that harmony and order in the enforcement of habitual offender sentences. Therefore, this Court is urged to specifically extend the application of the full faith and credit clause to the type of proceedings under review in this case.

CONCLUSION

For the reasons stated above, the amici states urge that the Court grant the State of

Colorado's Petition for a Writ of Certiorari and reverse the judgment of the Colorado Supreme Court.

Respectfully submitted,

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
Counsel of Record

Craig M. Eichstadt
Assistant Attorney General

David D. Wiest
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501-5090
Telephone: (605) 773-3215

ROBERT H. HENRY
ATTORNEY GENERAL
State of Oklahoma

Elizabeth J. Bradford
Assistant Attorney General
112 State Capitol
Oklahoma City, Oklahoma 73105
Telephone: (405) 521-3921

Counsel for Amici Curiae

September 1, 1989

APPENDIX

APPENDIX

LIST OF THE AMICI CURIAE

STATE OF CONNECTICUT
The Honorable John J. Kelly
Chief State's Attorney
Division of Criminal Justice
340 Quinnipiac Street
Wallingford, Connecticut 06492

STATE OF GEORGIA
The Honorable Michael J. Bowers
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

STATE OF INDIANA
The Honorable Linley E. Pearson
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204

STATE OF IDAHO
The Honorable James T. Jones
Attorney General of Idaho
Statehouse, Room 210
Boise, Idaho 83720

STATE OF KANSAS
The Honorable Robert T. Stephan
Attorney General of Kansas
Second Floor, Kansas Judicial Center
Topeka, Kansas 66612-1597

COMMONWEALTH OF KENTUCKY
The Honorable Frederic J. Cowan
Attorney General of Kentucky
State Capitol
Frankfort, Kentucky 40601

STATE OF MINNESOTA
The Honorable Hubert H. Humphrey, III
Attorney General of Minnesota
102 State Capitol
St. Paul, Minnesota 55155

STATE OF MISSISSIPPI
The Honorable Mike Moore
Attorney General of Mississippi
P.O. Box 220
Jackson, Mississippi 39205

STATE OF MISSOURI
The Honorable William L. Webster
Attorney General of Missouri
P.O. Box 899
Jefferson City, Missouri 65102

STATE OF NEW JERSEY
The Honorable Peter N. Perretti, Jr.
Attorney General of New Jersey
25 Market Street
Trenton, New Jersey 08625-0085

STATE OF NEW HAMPSHIRE
The Honorable John P. Arnold
Attorney General of New Hampshire
State House Annex
25 Capitol Street
Concord, New Hampshire 03301-6397

STATE OF NORTH CAROLINA
The Honorable Lacy H. Thornburg
Attorney General of North Carolina
Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602-0629

STATE OF NORTH DAKOTA
The Honorable Nicholas Spaeth
Attorney General of North Dakota
Department of Justice, 2115 State Capitol
Bismarck, North Dakota 58505

STATE OF OHIO
The Honorable Anthony J. Celebrezze, Jr.
Attorney General of Ohio
Federal Litigation Section
State Office Tower, 26th Floor
30 E. Broad Street
Columbus, Ohio 43266-0410

STATE OF SOUTH CAROLINA
The Honorable T. Travis Medlock
Attorney General of South Carolina
Rembert Dennis Office Building
P.O. Box 11549
Columbia, South Carolina 29211

STATE OF TENNESSEE
The Honorable Charles W. Burson
Attorney General of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219

STATE OF VERMONT
The Honorable Jeffrey L. Amestoy
Attorney General of Vermont
Pavilion Office Building
Montpelier, Vermont 05602

STATE OF WYOMING
The Honorable Joseph B. Meyer
Attorney General of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002